



Generally Speaking

COMINGS and GOINGS

Please Welcome

Martie Orem, Administrative Clerk and Receptionist, Fairbanks Attorney General's Office.

Shaneka Hamlett, Law Office Assistant I, Anchorage Human Services Section.

Rebecca Bradley, Law Office Assistant I, Anchorage Labor and State Affairs Section.

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A hearty welcome back to **AAG Larry Ostrovsky**, who returned to the Anchorage Oil, Gas, and Mining Section on August 1. The section also welcomed **Paralegal Lori Yares** joining the staff on August 21.

The Anchorage Office of Special Prosecutions and Appeals, Rural Prosecution Unit, was very pleased to welcome **AAG June Stein** to their offices.

AAG Robert "Bob" McFarlane joined the department as the agricultural attorney in the Commercial and Fair Business Section.

The Kodiak DAO reports **ADA Brent Williams** resigned his position effective August 15th to move to the mainland. Between that time and the end of the month the Office of Special Prosecutions and Appeals' **AAG Shannon Eddy** accepted a transfer to the Kodiak office effective October 20th. The Kodiak office looks forward to her arrival.

Jonathan Woodman started work in the Anchorage Torts and Workers' Compensation Section as an **AAG** on August 27. He will be handling tort cases in the section.

Candace Seils transferred from the Anchorage Legal Support Section to the Anchorage Collections and Support Section, Collections Unit, as an **Administrative Clerk II**.

Law Office Assistant I Ashlee Bonham transferred from the Anchorage Torts and Workers' Compensation Section to the Child Protection Section.

The Anchorage Transportation Section welcomed **AAG Dana Burke** to their staff. He transferred from the Torts and Workers' Compensation Section.

The Anchorage Legal Support Section welcomed **Michelle Calderon** to the offices; Michelle is the **Receptionist** at the front desk.

The Anchorage DAO welcomed two new **ADAs**, **Melissa Howard** and **Brett Watts**.

Victim Witness Paralegal Nanette Lindsey, in the Anchorage Office of Special Prosecutions and Appeals, Rural Prosecution Unit, is moving to Seattle. Nanette has worked for the Criminal Division for eight years and it is reported she will be sorely missed! On the positive side, **Victim Witness Paralegal Suzette Marey**, who now works in the Kenai DAO, is moving to Anchorage to work in the unit.

Welcome to **John Seagren**, Juneau Administrative Services Division. John will be filling **Doug Hanon's** position as the department's **Finance Officer**, when Doug retires effective September 19. Prior to coming to the department, John was an accountant with the Alaska Commission on Postsecondary Education and most recently managed his own CPA firm in Juneau.

The Fairbanks DAO welcomed **ADA Thomas Jamgocian** who transferred to the offices after having served the three previous years in the Bethel DAO. August also saw the retirement of **LOA Tara Munroe** who ably handled the offices' grand jury desk for years.

August was also a month of transition for the Barrow DAO. **Law Office Assistant Evelyn "Aubie" Gregg** joined the staff, as did **Paralegal Shannon Phillips**. New **ADA Teresa Buelow**, who had most recently been Judge Bolger's law clerk in Kodiak, trained in Fairbanks for two weeks in August before heading to the Barrow offices to become the new ADA there beginning September 1. She replaces **ADA Robin Koutchak**, who will be heading to the Office of Special Prosecutions and Appeals to become the new bootleg prosecutor for the state.

AAG Tim Twomey is transferring from the Anchorage Human Services Section to the Environmental Section.

KUDOS

Many congratulations to **Becky Allison** promoted to a **Paralegal I** in the Juneau Child Protection Section.

Best wishes to **Joleen Langel** promoted to a **Law Office Assistant II** in the Juneau Torts and Workers' Compensation Section.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

The Anchorage Police Department executed arrest and search warrants on a home for drug related charges. There was drug paraphernalia in the living room within easy reach of the toddler living there. The mother was arrested. She has a history of drug use and the father's whereabouts are unknown. The child was placed with relatives.

The Anchorage Police Department and OCS responded to an allegation of children being left unattended in filthy conditions. Allegedly, two children under the age of two were found alone playing in a public park. When officers arrived, they found the children unattended in a filthy trailer. There was a strong odor of gas and knives on the floor. The mother, who was sleeping in the back, was arrested for child neglect. At the time, the location of the grandparents and father could not be ascertained. OCS assumed emergency custody.

A twelve-year-old reported to school officials that his father punched him in the face causing a black eye. He also reported his father kicks him and calls him names. The father has a warrant out for his arrest resulting from this incident. The mother is out of contact with the child and

her whereabouts are unknown. OCS assumed emergency custody.

The Anchorage Police Department responded to a call of a domestic disturbance. They found two intoxicated males, too intoxicated to care for the four children in the home. It was also reported that the men beat the children with belts. As the mother is incarcerated, OCS assumed emergency custody.

OCS assumed emergency custody of an infant after his mother called the Anchorage Police Department to report that she planned to abandon him. The mother has a long history of mental illness and had several recent suicide attempts. The identity of the child's father is unknown.

OCS flew to a small village in rural Alaska in response to a report of harm – a serious domestic violence incident involving two intoxicated adults responsible for caring for a two-month-old child. When OCS arrived, they found the mother beaten, and both the mother and child covered in blood. While the mother was severely injured, it appeared the child was okay; OCS assumed emergency custody. The family has prior history with OCS.

OCS assumed emergency custody of two children after they were abandoned by their mother. The mother has a history of leaving her children with people and not returning. She also has substance abuse and mental health issues.

OCS received a report of harm alleging that two out of three young children had severe cases of genital warts. Further investigation revealed that the parents of the children may be father and daughter. As there were no immediate injuries, OCS agreed the parents could have supervisors live with them in the home instead of removing the children immediately. OCS has filed for custody with the courts.

OCS assumed emergency custody of a one-year-old after he presented at the hospital with

his mother. The child had a broken leg and extensive bruising on the rest of his body. The mother admitted to throwing the child across the room and admitted to smoking marijuana all day. She and her child had been living with a man with a history of felonies with concealed weapons and resisting arrest. The father of the child resides out of state. OCS is trying to contact him.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Commercial and Fair Business

Disciplinary Hearing Held in Fairbanks

On August 19–22, a disciplinary hearing against Fairbanks real estate broker Henry Bartos took place in Fairbanks. For the period at issue (2004–2006), Bartos held the majority interest in a corporation that owned the local Century 21 and Coldwell Banker franchises. Bartos was the broker at Century 21 and his business partner (who held the minority interest in the same corporation) was the broker at Coldwell Banker. The accusation filed by the Division of Corporations, Business and Professional Licensing (“Division”) alleged that Bartos improperly employed the Coldwell Banker broker as his assistant at Century 21 and also improperly employed a Coldwell Banker salesperson as a property manager at Century 21.

The division further alleged that Bartos treated Century 21 and Coldwell Banker as one company and failed to disclose inherent conflicts of interest and dual agency in transactions involving both franchises. Finally, with regard to one transaction, the division alleged that Bartos failed to ensure that a property disclosure form was signed by the buyer at the time of sale and when Bartos discovered the omission years later (after the buyer informed him that the house had flooded), he forged the buyer's signature on the

form. A proposed decision from the administrative law judge is expected in a few months. AAG Robert Auth represented the division in this proceeding.

Section Welcomes New Hire

Bob McFarlane has joined the Commercial and Fair Business Section in Anchorage as an AAG. He is assigned to represent and give advice to the Board of Agriculture and Conservation, the Division of Agriculture, and the Agricultural Revolving Loan Fund. This work returned to the section from the Natural Resources Section. Prior to 2003, this work had been handled by the Commercial Section. Bob comes to the Department with 27 years of private practice experience in the areas of bankruptcy, collections, foreclosures, landlord/tenant matters and general business litigation. He has been a sole practitioner since 1990. He went to Pepperdine University School of Law and is admitted in California and Alaska.

Human Services

Litigation Update

The section was served with two new class action lawsuits filed by the Northern Justice Project, alleging due process and other statutory problems with the personal care assistant program.

The Department of Health and Social Services (DHSS) referred three requests for hearings, which arise from older cases and decisions. Briefings in two appeals (one at the superior court level and one at the supreme court level) are pending. These appeals and hearings will be handled by Section Supervisor Stacie Kraly.

Licensing

AAGs Rebecca Polizzotto and Libby Bakalar successfully defended the Department of Health and Social Services in an appeal of an assisted living license revocation. The state had revoked the two licenses issued to Marcelina laquinto dba Alaska Best Home Care I & II. The state also took the unprecedented step of seeking to revoke the respondent's statutory exemption of operating without a license if there were less than three elders in care at each licensed facility. The hearing was scheduled for eight days. The respondent withdrew her appeal after three hours of testimony on the first day of the hearing. The effect is that the respondent's licenses are permanently revoked and the homes are permanently closed.

AAG Polizzotto settled the state's revocation of three residential child care facility licenses issued to Kenai Peninsula Community Care Center. The Department of Health & Social Services revoked the licenses after allegations of sexual abuse at the facility. The settlement agreement allows the facilities in Kenai to provisionally operate for a period not to exceed one year in accordance with a detailed management plan that was part of the settlement agreement. The settlement agreement also requires reporting to the licensing and placement divisions of the department.

Medicaid

From June to August, the Medicaid subrogation team resolved 51 cases for a total of \$224,864.07. For the same time period, they opened 90 new subrogation files, 16 new estate recovery files, and 32 special needs trusts files.

AAG Rebecca Polizzotto represented the Department of Health and Social Services at oral argument on August 1, in the matter of *David Calvert dba Hearing Outreach*. This case involved the department's attempt to recoup \$368,233.20 in Medicaid overpayments from this provider. Appellant raised seven issues on appeal to the superior court. Judge Michael

Spann issued a memorandum decision on August 25 finding for the state on all seven issues on appeal and affirming the state's right to recoup \$368,233.20 from this provider. AAG Libby Bakalar assisted with this case.

AAG Kimberly Allen received a favorable decision from the hearing authority after filing motions to dismiss based upon eligibility.

Other

AAGs Laura Derry and Erin Pohland are back in the office after taking the bar exam.

Labor and State Affairs

Education

Brooke M. v. Alaska Department of Education and Early Development. On August 12, the Ninth Circuit Court of Appeals issued a memorandum decision favorable to the state in this case. The case involved a claim brought under the Individuals with Disabilities Education Act by a student receiving special education services in Tok, Alaska, which is part of the Alaska Gateway School District. Brooke M. first filed an administrative complaint against the school district for its alleged failure to provide the minimum on-site monthly supervision of her therapy services. After an independent investigator concluded that Brooke was receiving an appropriate education and that no corrective action was required, Brooke filed a claim against the state in federal district court alleging the state had failed to adequately supervise the school district and that it had a duty to step in and provide on-site supervision of Brooke's therapies when the school district is unable. The state moved to dismiss Brooke's claim for her failure to exhaust administrative remedies, arguing that Brooke should have pursued a due process hearing against the school district. The court found that Brooke had not met her burden of establishing that a due process hearing would have been futile, and affirmed the district court's

dismissal for failure to exhaust. AAG Neil Slotnick handled this appeal for the state.

Oscar v. State. On August 7, AAG Neil Slotnick argued this case before the Ninth Circuit. The case concerns an award of attorney's fees to the state against the Disability Law Center. Awards of fees to defendants are rare in special education cases. Judge Beistline awarded the fees after dismissing an action that the Disability Law Center had filed rather than comply with a Department of Education and Early Development requirement that a complainant sign an administrative complaint.

Elections

Croft v. Pamell. On July 29, plaintiffs appealed from Judge Rindner's grant of summary judgment to the Lieutenant Governor involving a rule limiting ballot initiatives to a single subject. The court had found that a proposed initiative violated the rule by combining proposals to publicly fund elections and to impose an oil production tax. AAG Mike Barnhill is handling this matter.

Nick v. Bethel and Alaska. On July 30, Judge Burgess of the federal district court granted a preliminary injunction ordering the Division of Elections to implement several language assistance measures for the upcoming primary and national elections, although the relief is not much broader than the division's new language assistance efforts. The court did not order federal observers, but did require progress reports from the division both before and after the election and a sample ballot in written Yup'ik to assist in translation of ballot materials. AAG Sarah Felix handled this motion with assistance from AAG Mags Paton-Walsh.

Alaska Independence Party v. Division of Elections. On August 7, the Ninth Circuit Court of Appeals heard oral argument by AAG Mike Barnhill. At issue is whether a political party's constitutionally protected associational rights are violated by an Alaska law that allows individuals to affiliate with the party of their choice, and then

run as a candidate in that party's primary. The panel had asked for additional briefing on the impact on the argument of a recently decided United States Supreme Court decision, *Washington State Grange*, which recently reiterated that facial challenges are rarely sustained in election cases.

Employment and Labor Relations

State v. Alaska State Employees Association.

On August 22, the Alaska Supreme Court issued a decision in this case. The Court held that the state does not have sovereign immunity from prejudgment interest in labor arbitration cases; a court may not grant prejudgment interest from the date of discharge in an action to enforce an arbitration award if the arbitrator did not award the interest; and a court may award prejudgment interest from the date of an arbitration award. The Court reasoned that an action to enforce a labor arbitration decision should be treated as a contract action and thus sovereign immunity had been waived pursuant to AS 09.50.250. AAG Bill Milks handled this appeal for the state.

General Services

This month Administrative Law Judge (ALJ) Andy Hemenway issued a proposed decision in a contract claim by Technical Services Associates (TSA) against the Department of Corrections (DOC). DOC terminated its contract with TSA for default in January 2007 because TSA failed to provide a functional procurement software system. TSA filed a claim against DOC for \$106,550, the amount remaining under the contract plus compensation for alleged enhancements. TSA also sought attorney fees. DOC counterclaimed for the \$77,985.00 that it paid for the initial installation of the system. ALJ Hemenway denied TSA's claim, finding that the system provided was incapable of performing in substantial conformity with the contract requirements. The judge also denied the department's counterclaim for reimbursement, concluding that the initial installation was not proven unacceptable as an initial installation.

AAG Rachel Witty handled this matter on behalf of the Department of Corrections.

Motor Vehicles

Alvarez v. Department of Administration.

AAG Krista Stearns submitted the Division of Motor Vehicle's appellee's brief in the Alaska Supreme Court. Alvarez challenges the driver's license revocation arising out of her arrest for DUI, claiming that a two-year delay for the return of a key witness, the arresting officer who was deployed to Iraq, was a denial of due process. The administrative hearing officer continued the hearing until the officer returned.

Sudsbury v. Department of Administration.

The division prevailed against a motion to stay a license revocation in this case. AAG Krista Stearns handled the motion on shortened time.

Legislation and Regulations

During the first week of August, the section spent a busy month providing legal assistance for the fourth special legislative session. The section edited amendments and responded to legal questions about legislative process and coordinated the editing of bill reviews. The legislative session adjourned August 7, 2008.

The section also edited and legally approved for filing the following regulations projects: 1. Board of Labor and Workforce Development (Alaska Exemptions Act amounts; labor standards and safety); 2. Board of Fisheries (Southeast Alaska King/Tanner Crab Fisheries and miscellaneous fisheries; Upper Cook Inlet Area-Central District Drift Gillnet Fisheries Plan); 3. Department of Revenue (denial, revocation, and limitation of passports of obligors with child support arrears; oil and gas production tax and prevailing value of gas); 4. Board of Dental Examiners (specialty licenses); 5. State Board of Education and Early Development (science assessment proficiency scores; statewide assessment program for students with disabilities; professional content and

performance standards for beginning teachers; qualifications and duties of surrogate parents for purposes of special education); 6. Personnel Board (non-APA regulations regarding compensation and longevity pay); 7. Department of Commerce, Community, and Economic Development (commercial fishing loan program; insurance regulations relating to reinsurers, financial reporting, and custodians of insurers assets); 8. State Medical Board (collaborative relationships and plans); 9. State Physical Therapy and Occupational Therapy Board (telerehabilitation); 10. Regulatory Commission of Alaska (alternative dispute resolution); 11. Department of Environmental Conservation (contaminated site cleanup); 12. Board of Public Accountancy (licensure requirements, checklists, and reinstatement of lapsed license).

Additionally, the section conducted its annual regulations classes for state agency personnel and assistant attorneys general. About 90 students attended the classes. The section also conducted its first open house in Anchorage to meet staff at the Anchorage Civil Division.

Natural Resources

Polar Bear Lawsuit

On August 4, the state filed a lawsuit in the United States District Court for the District of Columbia challenging the listing of the polar bear as threatened under the Endangered Species Act (ESA). This action was filed under the ESA and the Marine Mammal Protection Act to address the failure of the Department of the Interior and Fish and Wildlife Service to perform certain duties under the acts, and under the Administrative Procedure Act for failure to comply with legal requirements in making the listing decision. The state claims that the determination listing the polar bear as threatened was not based on the "best scientific and commercial data available" and did not adequately consider the substantial efforts being made by Alaska, its

political subdivisions and foreign nations to protect and conserve polar bears. The Center for Biological Diversity, Natural Resources Defense Council and Greenpeace filed a motion to intervene in the case. AAG Brad Meyen and Holland & Hart LLP represent the state in this case.

Alaska Public Offices Commission Complaint

The Alaska Wildlife Alliance and several other groups and individuals brought a complaint before the Alaska Public Offices Commission (APOC) a few days before the August 26 primary election challenging the Department of Fish and Game's and Board of Game's predator control educational effort. The Legislature had appropriated \$400,000 to the department in early 2007 with instructions to educate the public about the state's predator control programs. The department worked for several months to develop three publications and a power point program that Board of Game members have subsequently presented at various venues around the state. The department made its publications available in December, January and February 2008, and then redistributed the shortest, a brochure, in several statewide newspapers in early August 2008.

The complainants argued that the entire effort, as well as the recent distribution and some associated radio notices, violated state campaign finance laws in that public funds were being used to influence the outcome of the election on Ballot Measure 2, which would have readopted the 1996 prohibition on same-day airborne shooting of wolves, with a few new additions. The commission granted expedited consideration and held its hearing on August 19. Based on the witness testimony and its review of the publications, the commission concluded that no campaign finance laws had been violated and that the educational effort was within the department's statutory mandates to educate the public on fish and game issues and especially on predator control. The complainants have requested reconsideration and further briefing is now ongoing. Senior AAGs Lance Nelson and Kevin

Saxby, who returned from vacation just in time to help with the hearing and subsequent briefing, are representing the Governor, the Commissioner of the Department of Fish and Game, and Board of Game.

Parks Highway Fire Litigation Settled

The litigation over the Parks Highway fire, which burned during June 2006, has settled. In July 2006 the state filed a claim to recover its unreimbursed suppression costs of \$2.9 million (plus statutory double damages) against the owner of the property where the fire started. The property owner in turn filed a complaint in interpleader, in which he deposited with the court what he represented to be the liability limits of his homeowners policy, and named as defendants the state, Toghotthele Corporation (the Nenana ANCSA corporation), and four other private property owners who lost property in the fire. Asset searches revealed that the property owner had little beyond the insurance proceeds to satisfy any adverse judgment. The settlement reached last week resolves all litigation concerning the fire and awards the state \$90,000. Other parties that suffered damage, including Toghotthele Native Corporation and private property owners, also received settlements. AAG Anne Nelson represented the Division of Forestry in this case.

Ninth Circuit Court Hears Oral Argument in Federal Subsistence Appeal

On August 5, the Ninth Circuit Court of Appeals heard oral argument in *State of Alaska v. Federal Subsistence Board, et al.* AAG Mike Sewright presented argument for the state. This is an appeal from a decision of the U.S. District Court for Alaska upholding a customary and traditional use (C&T) determination by the Federal Subsistence Board granting the community of Chistochina a priority to take moose under the federal program within the entirety of Game Management Unit 12 (10,000 square miles) based on evidence of actual use by that community of a small percentage of the

Unit to harvest moose. The three-judge panel concluded its questions and comments during oral argument by stating it realizes this is an important case. Its decision will follow.

Estate of Peter Phillips, Jr. v. Commercial Entry Fisheries Commission (CEFC)

In this superior court appeal from the denial of a Chignik purse seine limited entry permit, the fisherman claimed that he was entitled to additional points due to unavoidable circumstances. Phillips claimed that he did not operate as a gear license holder for several years because he could not lease a vessel. He further claimed that the reason he could not lease a vessel was that he was discriminated against as a Native from Perryville, and that this constituted unavoidable circumstances. The commission had rejected this claim, finding that it was more likely that Phillips could not lease a vessel because he had told off the cannery boss, who was in charge of leasing its vessels to fishermen. Judge Aarseth agreed that the commission's decision was supported by the record, and affirmed the denial of Phillips' permit. Phillips also argued that he should be awarded a permit because the commission unreasonably delayed in processing his application and granting him a hearing. He claimed that as a result of the delay essential evidence was lost and memories had faded and, in fact, Phillips himself had passed away. However, Phillips or his estate had never raised this argument before, and had never asserted to the commission that there was any evidence that he wanted to present but could not because of the passage of time. The court agreed that Phillips had waived this argument by failing to present it to the commission. Subsequent to the decision, the commission accepted an offer from Phillips to settle the case by its retaining the cost bond and Phillips dismissing the case with no further appeal. AAG Colleen Moore represented CFEC.

Oil, Gas, and Mining

Pro se miner Ed Ellis appealed the Department of Natural Resources' (DNR) decision to close the Donkey Terraces to mineral entry to superior court. After the parties submitted briefs, Judge Cutler affirmed DNR's decision. AAG Jon Katchen represented DNR on the matter.

Legislation approving issuance of the Alaska Gasline Inducement Act License (AGIA) to TransCanada Alaska was passed by the Alaska Legislature on August 1. This culminated over a year of intensive work for the Oil, Gas and Mining Section – from the drafting and passage of the AGIA legislation in 2007, to the request for applications, review of the applications, the commissioners' findings and determination, and finally passage of the license approval legislation. Also in August, AAGs Bonnie Harris, Lisa Weissler, and Larry Ostrovsky began considering the legal issues that will be involved in implementing the license.

Opinions, Appeals and Ethics

During the month, AAG Judy Bockmon addressed a variety of informal ethics inquiries by email and phone. She had several inquiries from or about former state employees, and has been working on one investigation.

The section completed and issued its informal attorney general opinion requested by the commissioner of the Department of Administration addressing personal use of state owned electronic equipment, particularly cell phones and PDAs (personal digital assistants – Blackberries). AAG Judy Bockmon is working on the associated regulations.

AAG Judy Bockmon has been working with the Department of Administration Training and Development staff to complete two ethics training classes, one a short module for the supervisors' academy and one for employees. She also

presented our ethics training program to the Alaska Public Office Commission commissioners on August 5.

Appeals

M.V. (mother) v. OCS, S-13065. The Office of Children's Services (OCS) filed its appellee brief this month in a mother's appeal of the termination of her parental rights. On appeal, the mother challenged only one of the required termination findings in this Indian Child Welfare Act (ICWA) case: the superior court's finding, beyond a reasonable doubt, that returning the daughter to her mother's care was likely to result in serious physical or emotional damage to the daughter. OCS defended this finding as proper given that at trial, the superior court heard evidence, including the testimony of a qualified expert witness, that the mother had made no meaningful progress on her case plan, but instead had continued to drink and use drugs excessively, get arrested, get into fights, and fall out of contact with OCS and her daughter—behaviors which had caused serious emotional damage to the daughter in the past. AAG Laura Bottger prepared the briefing on appeal.

M.B. (mother) v. OCS, S-13022. The Office of Children's Services (OCS) filed its appellee brief this month in a mother's appeal of the termination of her parental rights. On appeal, the mother challenged the superior court's finding that OCS had complied with the active efforts requirement of the Indian Child Welfare Act (ICWA). OCS defended this decision, arguing that while the mother had strongly resisted OCS' efforts to provide treatment and training to the mother, she had obtained a psychological assessment and a psychological evaluation, participated in a parenting class, completed a group therapy program, and received individual therapy. OCS also had arranged visitation and put therapeutic services into place for the children. AAG Joanne Grace prepared the briefing on appeal.

Other Matters

AAGs Stacy Steinberg and John Erickson met with Child Support Services Division (CSSD) Director John Mallonee, and members of the Aleutian Pribilof Islands Association, Human Services Department, Tribal Child Support Program (APIA TCS). APIA TCS represents 13 Aleut Tribal Governments, and is designed to assist parents support their children emotionally, socially and economically through: (1) paternity establishment; (2) child support order establishment; (3) child support order modification; (4) child support enforcement; (5) parent locate; and (6) case management. The APIA TCS is now entering its comprehensive year, during which it will start taking applications for services beginning on or about October 1, 2008. During the inaugural meeting the possibility of a memorandum of understanding (between APIA TCS and CSSD) was discussed.

The section assisted the Governor's Office and other state agencies with their responses to requests for copies of e-mail messages and other public records. They also provided backup assistance on matters such as the legislative investigation, the primary election, and the Alaska Public Offices Commission's hearing on state officials' statements and website information about the "clean water" ballot initiative.

Regulatory Affairs and Public Advocacy (RAPA)

Rulemaking Comments Filed

R-06-05, Federal Energy Policy Act implementation. The Regulatory Commission of Alaska (RCA) opened a rulemaking docket responsive to the federal requirement that it consider the adoption of new energy standards posed by federal legislation for: net metering, fuel source diversity, and generation fuel efficiency, respectively. If adopted, such

standards would only apply to Alaska's four largest electric utilities (all located in the Railbelt). The commission has conducted or sponsored numerous workshops and received broad public comment in this docket, including that of the relevant electric utilities.

The provision for net metering allows for development of customer-owned/self power generation (including renewables) that interconnects to the established power grid.

The fuel diversity standard is a risk management tool to improve price stability and fuel availability by minimizing dependence on one fuel source. The fuel efficiency standard involves development of a 10-year plan for promotion of conservation of fossil fuels. The commission proposes to adopt the net metering and fuel diversity standards but to decline to adopt the fuel efficiency standard.

The Attorney General/RAPA filed the comments of staff analyst Janet Fairchild on July 28, 2008. Generally, those comments supported the adoption of all three subject standards. In particular, RAPA proposed that net metering be limited to on-site facilities that are at least as efficient as the average utility-owned generation, and that subject utilities be allowed to place reasonable caps on the amount of net-metered generation allowed into the grid. Further, that the commission should consider incorporating fuel efficiency improvements into required resource planning processes by electric utilities, including consideration of a regional approach to cost-effective new generation.

Stipulated Settlements

U-07-141, Beluga Pipeline. On September 4, 2007, Beluga Pipeline Company (BPL) filed a tariff revision proposing to increase its current, interim refundable rate for natural gas transportation service in the Cook Inlet from \$0.25 per Mcf to \$0.317 per Mcf, except for shipments under special contract with Aurora Gas. BPL is a 16-mile pipeline owned by Marathon Oil Company.

The Attorney General/RAPA elected to participate in the proceeding on October 9, 2007.

Attorney General direct testimony was filed on May 30, 2008 advocating that the permanent rate should remain at \$.025. Mediation was subsequently held which yielded a settlement resulting in a maximum rate that mirrors the cost-based rate proposed by RAPA, but also allowed BPL to negotiate discounts for new shippers (to encourage throughput and recovery of fixed costs). In order No. 9 issued on July 25, 2008, the commission accepted the filed settlement, as a result of which there will be no BPL rate increase to its postage-stamp rates for natural gas transportation in the Cook Inlet.

U-07-144, Adak telephone utility. Adak Eagle Enterprises, LLC dba Adak Telephone Utility (Adak) filed a simplified rate filing before the RCA based upon a 2005 test year proposing to reduce rates by 23 percent, as opposed to a potential rate reduction of 56 percent, because the utility sought to avoid a whipsaw effect in subsequent, near-term rates due to anticipated cost increases. Adak's base rate for residential telephone service is presently \$100/month. Responsive to commission request, the Attorney General/RAPA filed a notice of election to participate on January 18, 2008.

RAPA's review entailed an examination of the utility's cost estimates and the methodology for application of Adak's universal service fund subsidy. Just prior to the filing of direct testimony in the case, the parties stipulated to settlement terms in which the utility agreed to implement the full 56 percent rate reduction that its filing cost-justified, and to abandon its claim of rate oscillation. The utility also agreed to file a full rate case based upon a 2008 test year by August 30, 2009.

The settlement was presented to the commission on August 18. If the commission approves the settlement, Adak ratepayers will look forward to a refund of the difference (33 percent) between rates charged on an interim basis during the term of this proceeding and permanent rates,

and a permanent rate reduction of 56 percent going forward.

Torts and Workers' Compensation

The section defended at trial a medical malpractice case filed by a former federally remanded inmate who alleged that he failed to get timely care for a hand injury while he was in state custody. Because plaintiff insisted upon a high settlement value for his case, the matter was tried to a jury in Anchorage. The jury was convinced that the plaintiff fractured his hand while incarcerated and that a delay in medical treatment caused additional problems. However, the jury assigned 40 percent of the fault to plaintiff for his delay and lack of candor in seeking treatment. The state obtained a directed verdict on economic damages. Plaintiff recovered non-economic damages which were substantially less than his last settlement demand before trial. The case was defended by AAG Stephanie Galbraith.

The Ninth Circuit Court of Appeals heard argument in an action under 42 U.S.C. sec. 1983 brought by the parents of Casey Porter, who was fatally shot by an Alaskan State Trooper in 2003. The Porters claim that the shooting violated their rights under the 14th Amendment's Due Process Clause to the continued companionship and association with their independent adult son. The legal questions before the court in this interlocutory appeal are (1) In a claim for damages under the due process clause, what legal standard should be used to evaluate the Trooper's actions, and (2) is the Trooper entitled to qualified immunity from suit on those claims? The defendant trooper, represented by AAG Ruth Botstein, argued that his actions only violated the due process clause if they shocked the judicial conscience and that under that standard he was entitled to summary judgment as a matter of law. Plaintiffs advocated for application of a legal standard under which the trooper could be held liable if his actions were deliberately indifferent to the Porters'

constitutional rights. The Ninth Circuit panel was active and interested in the case, and posed difficult questions for both attorneys. Proceedings in the case are stayed pending the appeals court's decision

Transportation

The Wheels on the Right-of-Way Go Round and Round

Ahtna Native Corporation filed three lawsuits against the Department of Transportation and Public Facilities claiming title to two gravel pits and a road right-of-way. One of the lawsuits was filed in federal court. The state moved to dismiss the lawsuit filed in federal court, asserting Eleventh Amendment immunity. The state then filed a parallel complaint in state court, seeking a state court ruling on the same issues Ahtna had raised in federal court. In response, Ahtna removed the state court action to federal court. The federal court granted the state's Eleventh Amendment motion to dismiss the federal lawsuit and remanded the state court action back to state court. Ahtna moved for reconsideration of the court's orders, necessitating another round of briefing; in an abundance of caution, Ahtna also appealed the court's orders to the Ninth Circuit. AAG Leone Hatch represents the state.

Condominium Condemnation Conundrum

The Department of Transportation and Public Facilities needs a narrow strip of land in front of a condominium development to widen and extend East Dowling Road, between Lake Otis Parkway and Elmore Road. Although the strip is common-use land within the condominium development, the condominium association lacks authority to convey the land due to the wording of the documents that originally created the condominiums. Because each owner in the condominium development (along with their lenders and other lienholders) held an interest in the strip of common use land, the state filed a

condemnation against each owner, lender and other lienholder – resulting in service of process on over three hundred defendants. AAG Susan Urig filed the condemnation, with invaluable assistance from Paralegal Sherene Jensen and Law Office Assistants Beth Goodwin and Barb Peterson.

Many Driveway Permit Hearings

The Department of Transportation and Public Facilities (DOT&PF) issues permits for driveways opening onto state roads. Three different property owners in Anchorage, Fairbanks, and the Kenai Peninsula, who did not receive driveway permits, appealed DOT&PF's decisions to administrative hearing officers. AAGs Jeff Stark, Jeff Wildridge, and Rick Welsh assisted DOT&PF with these hearings.

Telephone Hill Parking Garage Drives Forward

The City & Borough of Juneau and the state reached tentative agreement on a land transaction that will allow the borough to construct a parking garage at the bottom of Telephone Hill in downtown Juneau. AAGs Peter Putzier, Rick Welsh and Jim Cantor assisted the state.

CRIMINAL DIVISION

Anchorage DAO

Anchorage and Dillingham conducted 10 trials and 69 grand juries for the month.

ADA Susan Mitchell concluded the first half of an arson murder trial with the mid-trial plea of Peter Chunak to the highest charge, murder two. Chunak and his co-defendant got drunk and angry, stole some booze from the victim, and then lit his house on fire by lighting the straw in the arctic entry where the victim kept his Iditarod dogs. As ADA Mitchell put it, once she put the partial confession on, the defense that "some other dude did it" was gone.

ADA Brittany Dunlop went to Dillingham to prosecute pro se defendant Danny Pearson for possessing two pound of marijuana and maintaining a marijuana grow. After dispensing with a lot of motions, the trial ended with Pearson's conviction.

ADA Sharon Marshall conducted the short, successful murder one trial of Todd Tix. Mr. Tix murdered his drug dealer friend because Tix, a spooky meth user, believed (apparently wrongly) that the target of the shooting was hooking up Tix' estranged girlfriend with drugs. Tix confessed to anyone who would listen. Tix also took the witness stand and tried to convince the jury that the shooting was justified. The jury was not persuaded.

ADA Alan Goodwin successfully tried the attempted domestic violence murder case against Earl Bates. Contrary to conventional wisdom, the jury did not believe the defense that "if he intended to kill her he would have finished her off." The woman was battered, kicked and strangled. Two men in the residence were also attacked. One of the men called 911 and Bates took the phone for part of the conversation. Bates is heard exhaling hard at times. After reflection it seemed clear that Bates was stomping on the victim's neck while he was talking on the phone. This makes three attempted murders this year on which Anchorage juries have convicted.

Fairbanks DAO

Some weeks before May 15, 2004, a then 20-year-old Fairbanks man murdered and dismembered a 24-year-old associate because he believed him about to go to the police with information about his methamphetamine supplier. Not wishing to lose his drug supplier, the defendant lured his "friend" to a secluded location about 40 miles outside Fairbanks and shot him twice in the back of the head with a .22 caliber pistol. With the help of two confederates, the defendant then dismembered

the victim's body so that the parts would more easily sink into, and be disburied by, the swift and swirling currents of the Chatanika River.

The defendant chose, however, to keep the victim's head and a piece of arm-flesh containing an identifying tattoo in the trunk of his car. The tattooed arm was kept in an attempt to curry favor with his drug dealer, whom he believed would be quite happy with him and willing to reward him with drugs for taking up his dealer's cause by killing the victim. The victim's head was kept so that the defendant could pull out and variously disburse all of his teeth prior to disposing of it so that the victim could not be identified by his dental records. On May 15th, 2004, before being able to accomplish either of those tasks, the defendant abandoned his car (registered in his name), which still included the victim's head and arm flesh in the trunk, and fled on foot after eluding an Alaska State Trooper attempting to stop the car for a traffic infraction. The troopers impounded the car, and after baking in the Fairbanks sun for some weeks, the Troopers noticed a foul odor emanating from their impound lot. Upon investigation they found the still-toothed head of the victim, which they were able to identify by the victim's dental records.

At the time of the eluding on May 15, 2004, the defendant had been on release in a pending felon in possession of a hand gun case. When later confronted by investigators the defendant stated that he had insisted that the driver flee from the trooper trying to stop them because he had not been in the custody of his third-party-custodian father as had been required by his conditions of release, and denied any knowledge of the victim's disappearance and murder. When confronted with the statements of his confederates, he then claimed that he had been present when others killed the victim, and that he had only participated in dismembering his body. When arrested on the murder charge he was found in possession of yet another hand gun.

After 24 months of opposing the seemingly constant and endless motions practice and legal

wrangling of defense counsel, the defendant's options narrowed down to three choices: (1) plead to murder in the second degree with an Rule 11 agreement of 70 years to serve, (2) plead to murder in the second degree and the misconduct involving weapons (felon in possession), open sentencing, or (3) go to trial for first degree murder, tampering with physical evidence, misconduct involving a controlled substance in the fourth degree, and misconduct involving a corpse, felon in possession, and additionally face open disposition on a pending felony petition to revoke probation in a prior misconduct involving a controlled substance IV case. After having lost every significant contested motion, including the sixth and latest motion to continue the trial, the defendant pled to murder in the second degree and misconduct involving weapons (felon in possession) in November 2007, open sentencing. In August, after losing his fourth and latest motion to continue sentencing, this defendant was sentenced to 80 years to serve on the murder with a consecutive five years to serve on the felon in possession. Congratulations to Fairbanks Chief ADA Scott Mattern, who was very ably assisted by Paralegal Marja Hallsten, for getting a great result in a very difficult prosecution.

By comparison, the rest of August was rather pedestrian. Even with a number of attorneys on leave during the month the offices had eight cases go to trial and received convictions in seven of them, including one fourth degree assault victory by summer intern Nicholas Cummings. Fifty-five new cases were presented to the grand jury during the month, including everything from the all too common felony DWIs and felony thefts, to the ever increasing misconduct involving controlled substance cases, to an attempted murder by strangulation, multiple sexual assaults and one abuse of a minor case.

Kodiak DAO

August was busy in Kodiak. During the second half of the month Rural Prosecution Unit AAGs Gregg Olson and June Stein manned the Kodiak office while DA Steve Wallace was out of state on leave. The support of the Rural Prosecution Unit has been particularly helpful during the summer as the offices have been short staffed. Thanks to AAGs Dwayne McConnell, Gregg Olson and June Stein. At the end of the month, Superior Court Judge Bolger was appointed to the Court of Appeals. While Kodiak certainly wishes Judge Bolger well in his new position, his steady presence on the bench in Kodiak will be missed.

Palmer DAO

Convicted sex offender Kelly Carr was again sentenced (for the third time) to a composite sentence of 29 years with 15 years suspended, 14 years to serve. In February 2004, Carr was convicted of two counts of sexual abuse of a minor in the first degree, two counts of sexual abuse of a minor in the second degree, unlawful exploitation of a minor and five counts of possession of child pornography. Defendant was sentenced on June 25, 2004, the day after the *Blakely* decision was published. Carr was sentenced to 29 years with 15 suspended. The sentence was based on four aggravating factors.

The judge ruled that *Blakely* was not retroactive. Four days later, Judge Smith issued an order indicating he was mistaken in not applying *Blakely* and the defendant was to be re-sentenced. Because of *Blakely*, three of the state's four aggravating factors could no longer be used. ADA Rachel Gernat, argued that under *Andrews*, *Allain* consecutive sentencing law and the one remaining aggravator, that the court could impose the same sentence. Judge Smith agreed, and Carr was again sentenced to serve 14 years with 15 years suspended. However, the Court of Appeals found that the one aggravator used was

done so in violation of *Juneby*, and the case was again remanded for sentencing. Thanks to the combined efforts of the Office of Special Prosecutions and Appeals AAG Diane Wendlandt and ADA Rachel Gernat, Carr was again sentenced to the composite sentence he received four years ago.

Viktor Natekin was sentenced to a composite term of 45 years with 15 years suspended, 30 years to serve plus 20 months on a petition to revoke probation for his convictions of attempted sexual assault in the first degree and sexual assault in the second degree. A jury convicted Natekin for grabbing a 17-year-old at a small get-together and pulling her into a room. He then groped her and tried to get her pants down. The assault was thwarted when the victim's friend called her cell phone and heard the assault. She came to the victim's aid and knocked down the door. The victim came running out with her shirt ripped and the defendant had his pants undone. At trial, the defendant claimed that the victim stole money from him and he was looking for it. Natekin was on felony probation and thus the court found an aggravator (20). Natekin is also on an Immigration and Naturalization Services hold and set for deportation at the conclusion of his sentence. Prosecutor Rachel Gernat handled this case.

On August 18, a jury convicted Cheryl Nichols of theft II, theft II by receiving, fraudulent use of an access device, and theft III. The defendant was charged after being caught on video with her boyfriend and codefendant at Walmart using a stolen gift card. The card had been in a purse that was stolen from a bar two days previously. This was a difficult case in that no one saw the purse taken and the defendant's boyfriend, who actually used the card, was out on bench warrant status. The state was able to bring in evidence of the police contacting the two codefendants together on previous occasions in order to rebut the argument presented in defense's opening statement, that Ms. Nichols had just met her codefendant that evening, got duped, and then left "holding the bag" at trial

while he ran from the charges. ADA Alison Collins prosecuted this case.

On August 22, Kiel Cavitt was convicted of fourteen felony drug charges after a four-day jury trial. On August 31, 2007, officers went to Cavitt's home after receiving a crime stopper tip that Cavitt's brother, wanted on a felony warrant, was at the home. The tipster also told officers that inside the home there was a safe containing \$60,000 and cocaine and that Cavitt's brother was preparing to leave the state. When officers arrived at the home to serve the arrest warrant, they smelled the odor of cultivating marijuana emanating from the residence. Officers applied for a search warrant for the residence, and were attacked by one of the defendant's two pit bulls upon entry. A safe was located in the kitchen. Officers cut open the safe and found \$2700 in cash, 10 morphine pills, hashish, LSD, mushrooms and baggies. Also in the kitchen was a hashish making machine. In the crawlspace of the home there was a marijuana grow operation containing 32 plants and evidence of at least one prior harvest. In the living room, in plain view, officers found an additional 24 grams of mushrooms and a digital gram scale. Twelve ecstasy pills were found on the nightstand in the defendant's bedroom.

Despite the fact the defendant argued to the jury that he simply sold marijuana as a way to support his addiction to pain pills, and that he never sold any of the other drugs found in his home, the jury returned guilty verdicts on all fourteen counts, including convictions for dealing morphine, ecstasy, hashish, LSD and mushrooms. Cavitt is in custody with no bail and has a prior felony conviction. His sentencing is November 26, 2008. This is Prosecutor Kerry Corliss' case.

On August 14, a Palmer Grand Jury returned an indictment against Joshua Vialpando for assault in the first degree and felony leaving the scene of an injury accident. The charges stem from an August 6 incident in which Vialpando, after a night of drinking, approached a road construction site at a high rate of speed. Vialpando hit the victim Lacy McDaniel head-on as she was

working as a flagger. The victim crashed through defendant's windshield. Defendant drove the victim 200 feet down the Parks highway before her body slid off of the front of his car. Defendant then circumvented a dump truck driver and others that tried to stop him. Defendant drove home and passed out. The victim nearly died; she has undergone multiple surgeries including removing her spleen, repairing many broken bones and internal injuries and connecting two dislocated knees. The victim will be in intense rehab for at least 18 months and probably will not walk for a year. Defendant has several traffic related prior convictions. Bail was set at \$50,000 cash and court approved third party custodian. ADA Richard Allen is the prosecutor.

Office of Special Prosecutions and Appeals (OSPA)

Appellate Unit

The past month saw noteworthy victories in two state appeals brought by the Appeals Unit in addition to the unit's normal workload of defending the state against appeals brought by defendants:

Steven Basurto v. Frank Luna (unpublished). In this case, AAG Diane Wendlandt convinced the Ninth Circuit Court of Appeals to reverse the decision of the U.S. District Court to grant federal habeas relief to Basurto. Basurto was convicted in 2000 of first degree sexual assault, kidnapping, and third degree assault for his abduction and rape of V.B. During trial, evidence of his similar assaults on three other women was admitted without a limiting instruction as to the evidence. The Alaska Court of Appeals held in 2003 that the lack of a limiting instruction was error, but harmless in light of the final jury instructions that were given and the prosecutor's closing argument. In 2008, the U.S. District Court disagreed with the Alaska Court of Appeals, finding that the lack of a

limiting instruction was sufficiently harmful to constitute a violation of Basurto's right to due process. The state appealed to the Ninth Circuit Court of Appeals, and this past month that court reversed the U.S. District Court, holding that the Alaska Court of Appeals' holding of harmless error was entitled to more deference than Judge Timothy Burgess had given it.

State v. Stafford (unpublished). In this case, the defendant was electronically monitored while he was on bail release pending his charges of sexual abuse of a minor. Superior Court Judge Eric Smith then granted the defendant two years of credit against his sentence for the time he spent being electronically monitored. The effect of the judge's decision was that the defendant would not serve prison time for his conviction of second degree sexual of a minor. The state appealed and the Alaska Court of Appeals agreed with the state, holding that electronic monitoring did not constitute the custody necessary for granting sentence credit. This decision reaffirmed appellate decisions in no less than five other cases holding that trial courts should not grant sentence credit for electronic monitoring.

Rural Prosecution Unit

The Rural Prosecution Unit was in an assistance mode this month. The unit sent attorneys to Bethel for almost two weeks and to Kodiak for a full two weeks. While in the Bethel office, the rural prosecution attorney indicted an individual for sexual assault in the first degree. If convicted, the offender will be subject to the three strikes mandatory sentencing law.

AAG June Stein joined the office in mid-month which pleased everyone. AAG Stein is already into the traveling mode visiting Kodiak for a week and Bethel the following week.

Special Prosecution Unit

On August 8, the Cordova District Court imposed sentence on Dale R. Pruitt for his role in the grounding of the *F/V Nordic Viking* near Point

Gravina July, 2007. Pruitt pled guilty to criminal charges of operating a boat in a negligent or reckless manner and oil pollution, both Class A misdemeanors. On the operating a boat in a negligent or reckless manner charge, Magistrate Adams imposed a one year suspended imposition of sentence on the condition that Pruitt obey all laws and regulations and enroll in and successfully complete a state-approved alcohol treatment program – the Alaska Alcohol Safety Action Program (AASAP). On the oil pollution charge, Magistrate Adams imposed a conviction of record with 15 days of jail time, 75 additional days of suspended jail time, 40 hours of community work service and four years of probation on the condition that Pruitt obey all laws and regulations, including all environmental laws and regulations.

Pruitt was at the helm of the *Nordic Viking* when it ran onto a rock outcropping directly in front of a large island. The impact ruptured a front fuel tank which released approximately 3500 gallons of diesel to the water. The spilled diesel caused sheen that was visible for several days and disrupted salmon fishing for many boats. Only a small fraction of the diesel was recovered. It was apparent to responders that Pruitt was intoxicated. Pruitt refused to provide a saliva sample for alcohol testing until asked to do so by his employer the morning after the grounding. Pruitt's saliva sample, provided approximately fourteen hours after the grounding, still registered a presence of alcohol. A urine sample from Pruitt also tested positive for the presence of marijuana. Pruitt denied that he had been drinking. Pruitt told investigators that he had been tired and simply fell asleep.

Earlier this year, Nordic Viking, LLC, the owner of the *F/V Nordic Viking*, reached an agreement with the state to resolve its potential liability for the incident. The company paid a \$17,500 fine to the state's oil spill response fund and implemented drug and alcohol testing for a period of a year on other fishing boats operated by its members. The company also engaged in a supplemental environmental project that

contributed \$10,000 to the marine debris clean-up program operated by the Gulf of Alaska Keeper. That program collects washed up fishing gear from beaches in Prince William Sound and the Gulf of Alaska.

SAVE THE DATE

October 1-3 – Civil Division Conference
Anchorage

October 6-8 – Criminal Division DA/Paralegal
Conference, Girdwood